IN THE COURT OF APPEALS OF IOWA

No. 0-465 / 09-1712
Filed July 28, 2010

DONNIE W. ROBINSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Clinton County, Mark J. Smith, Judge.

Applicant appeals the district court decision denying his request for postconviction relief on his conviction for possession of cocaine with intent to deliver. **AFFIRMED.**

Steven Drahozal of Drahozal & Schilling, Dubuque, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Mike L. Wolf, County Attorney, and Robin L. Strausser, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ. Tabor, J., takes no part.

DANILSON, J.

I. Background Facts & Proceedings

Donnie Robinson was charged with distribution of cocaine to a person under eighteen, a class B felony. *See* Iowa Code § 124.406(1)(a) (2005). He entered into an open plea agreement to an amended charge of possession of a controlled substance (cocaine) with intent to deliver, in violation of Iowa Code section 124.401(1)(c)(2)(b), a class C felony. Under the plea agreement, the State would concur with any sentencing recommendation in the presentence investigation report, and would not resist a waiver of the one-third mandatory minimum sentence. During the plea proceedings Robinson was informed the court was not bound to any particular sentencing recommendation.[1]

The presentence investigation report recommended a suspended sentence with probation. During the sentencing hearing, the court asked the State, "Does the State have any recommendation concerning sentencing, beyond what is contained in the plea agreement?" and the State responded, "No, Your Honor." Robinson also asked for a suspended sentence and to be placed on probation. The court noted Robinson had been on probation at the time of the current offense and stated there had been a "failure of community-based correctional efforts in the past . . . ." The court sentenced Robinson to a term of imprisonment not to exceed ten years, with the mandatory minimum sentence

[1] During the plea proceedings, the district court stated it had three options: (1) to accept the plea agreement and embody the agreement in the judgment when sentence was pronounced; (2) reject the plea agreement and give Robinson the opportunity to withdraw the plea; or (3) defer acceptance or rejection until the court had the presentence investigation, and then if the sentencing court decided not to accept the plea, Robinson would have a chance to withdraw the plea. These statements were inapposite because the plea was in fact an open plea, where the court was not bound by the parties' sentencing recommendations.

waived. Robinson's direct appeal was dismissed as frivolous pursuant to Iowa Rule of Appellate Procedure 6.1005 (formerly rule 6.104).

Robinson filed an application for postconviction relief, claiming he received ineffective assistance due to defense counsel's failure to object when the State breached the plea agreement. He claimed the State was required to advocate for the sentencing recommendation in the presentence investigation report. The district court found, "There is nothing in the sentencing transcript to indicate that the State did not honor its commitment to the Defendant at the time of sentencing." The court concluded defense counsel did not breach an essential duty. The court denied Robinson's request for postconviction relief. Robinson appeals.

II. Standard of Review

Postconviction proceedings are law actions ordinarily reviewed for the correction of errors at law. *Bugley v. State*, 596 N.W.2d 893, 895 (Iowa 1999). Claims of ineffective assistance of counsel, however, are reviewed de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008).

III. Merits

A calendar entry of plea agreement proceedings, signed by Robinson, his attorney, and the assistant county attorney provides, "[t]he State will concur with any recommendation contained within the pre-sentence investigation report regarding sentencing." Robinson claims the State breached the plea agreement

by not actively advocating for the sentencing recommendation in the presentence investigation report. He asserts the prosecutor was required to actually present the recommended sentence. Robinson contends he received ineffective assistance because his defense counsel did not object to the State's breach of the plea agreement. He claims he was prejudiced by counsel's performance.

In order to prevail on such a claim, an applicant must first show the State breached the plea agreement. *State v. Carrillo*, 597 N.W.2d 497, 500 (Iowa 1999). "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration [for the plea], such promise must be fulfilled." *State v. Horness*, 600 N.W.2d 294, 298 (Iowa 1999) (citations omitted). Our supreme court has stated:

> A fundamental component of plea bargaining is the prosecutor's obligation to comply with a promise to make a sentencing recommendation by doing more than "simply inform[ing] the court of the promise the State has made to the defendant with respect to sentencing." *Horness,* 600 N.W.2d at 299. The State must actually fulfill the promise. Where the State has promised to "recommend" a particular sentence, we have looked to the common definition of the word "recommend" and required
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> > the prosecutor to present the recommended sentence[ ] with his or her approval, to commend the sentence[ ] to the court, and to otherwise indicate to the court that the recommended sentence[ ] [is] supported by the State and worthy of the court's acceptance.
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> *Id.* (citing *Webster's Third New International Dictionary* 1897 (unabr. ed. 1993) (defining "recommend" to mean (1) "to mention or introduce as being worthy of acceptance, use, or trial," (2) "to make a commendatory statement about as being fit or worthy," (3) "to bring forward as being fit or worthy," (4) "present with approval," (5) "indicate as being one's choice for something or as otherwise having one's approval or support," (6) "offer or suggest as favored by oneself")); see *also United States v. Brown,* 500 F.2d 375, 377

> (4th Cir. 1974) (requiring the prosecutor's recommendation be "expressed with some degree of advocacy").

State v. Bearse, 748 N.W.2d 211, 215-16 (Iowa 2008). A violation of a plea agreement by the State adversely impacts the integrity of the office of the prosecutor and the entire judicial system. *Id*. at 215. The prosecutor's violation of either the terms or the spirit of a plea agreement requires reversal of the conviction or vacation of the sentence. *Horness*, 600 N.W.2d at 298.

If the State agrees to remain silent at sentencing, it cannot then recommend a sentence. *See Carrillo*, 597 N.W.2d at 500. If the State promises to "recommend" a particular sentence it means the prosecutor must "present the recommended sentences with his or her approval, to commend these sentences to the court, and to otherwise indicate to the court that the recommended sentences are supported by the State and worthy of the court's acceptance." *Horness*, 600 N.W.2d at 299. The State may not suggest a more severe punishment than it was obligated to recommend under the terms of a plea agreement. *Bearse*, 748 N.W.2d at 216. "Our system of justice requires more and does not allow prosecutors to make sentencing recommendations with a wink and a nod." *Id.* at 218.

However, in this case, the State agreed to concur in the sentencing recommendation in the presentence investigation report. The word "concur" means "to occur at the same time, happen together, coincide"; "to combine in having an effect, act together"; or "to agree, be in accord." Webster's New World Dictionary 295 (2d college ed. 1976); *see also* Black's Law Dictionary 286 (7th ed. 1999) (defining one meaning of "concur" as "to agree; to consent"). The term

"concur" does not have the same meaning as the term "recommend." Because the State did not agree to "recommend," only to concur in the same sentence set forth in the presentence investigation recommendation, the State was not required to advocate for the sentence, or introduce it as being worthy.

Robinson's plea agreement essentially provides that, "[t]he State will [agree] with any recommendation contained within the pre-sentence investigation report regarding sentencing." The court questioned the prosecutor, "Does the State have any recommendation concerning sentencing, beyond what is contained in the plea agreement?" and the State responded, "No, Your Honor." The court's question assumed the State's position was as set forth in the agreement, and the State's response reflects that it was abiding by the agreement.[2]

We agree with the district court's conclusion, "[t]here is nothing in the sentencing transcript to indicate that the State did not honor its commitment to the Defendant at the time of the sentencing." Robinson has not shown the State breached the plea agreement. Defense counsel does not have an obligation to raise an issue that lacks merit. *State v. Taylor*, 689 N.W.2d 116, 134 (Iowa 2004). Robinson has failed to show he received ineffective assistance of counsel. We affirm the district court decision denying his application for postconviction relief.

AFFIRMED.

Vogel, P.J., concurs; Potterfield, J., dissents.

[2] Subsequently, during the sentencing hearing, the court stated it had "reviewed the presentence investigation report." Clearly the sentencing court was familiar with both the agreement and the report at the outset of the sentencing hearing.

POTTERFIELD, J. (dissenting)

I respectfully dissent and would reverse and remand for resentencing because the prosecutor breached the plea agreement and counsel failed to object, both of which undermined the integrity of the sentencing proceedings here.

The record reflects that the prosecutor made no effort to support the recommendation for probation and thus failed to comply with the plea agreement. Unlike my colleagues, I do not agree that the semantic difference between "concur with" the recommendation of the presentence report and "recommend" the sentencing recommendation of the presentence report justifies the prosecutor's silence at sentencing. Our supreme court has recognized the importance to the judicial system of the prosecution's compliance with plea agreements. Violations of plea agreements "adversely impact the integrity of the prosecutorial office and the entire judicial system." *State v. King*, 576 N.W.2d 369, 370 (Iowa 1998). Further, "'[b]ecause a plea agreement requires a defendant to waive fundamental rights, we are compelled to hold prosecutors and courts to the most meticulous standards of both promise and performance.'" *State v. Horness*, 600 N.W.2d 294, 298 (Iowa 1999) (quoting *State ex rel. Brewer v. Starcher*, 465 S.E.2d 185, 192 (W. Va. 1995)).

The use of the word "concur" rather than "recommend" is an inadequate excuse for ignoring the role of plea agreements in "the honor of the government" and "public confidence in the fair administration of justice." *See State v. Bearse*, 748 N.W.2d 211, 215 (Iowa 2008). In this case, both defense counsel and the prosecutor may well have been informed of the court's sentencing decision

before the record of the sentencing proceeding began and both may have understood that argument for a different sentence would not be successful. However, both counsel were required to make their records, consistent with the plea agreement. The prosecutor was required to support the recommendation of the presentence investigator with more than "a wink and a nod." *See id.* at 218 ("Our system of justice requires more and does not allow prosecutors to make sentencing recommendations with a wink and a nod."). The presentence report included reasons for the presentence investigator's recommendation for a suspended sentence, any of which could have been used by the prosecutor to justify her agreement with the recommendation. Defense counsel failed in an essential duty when he did not object to the prosecutor's failure to advocate for the favorable sentencing recommendation.

Further, Robinson was prejudiced by counsel's failure to object to the prosecutor's breach of the plea agreement. *See id.* ("[A]n objection by defense counsel leads to a procedure that alerts the court to correct the taint by allowing the defendant to withdraw the plea or by scheduling a new sentencing hearing with a prosecutor who will make the promised recommendation.") Thus, the outcome of the sentencing proceedings in this case would have been different had counsel objected.

When the district court erroneously fails to remedy a prosecutor's breach of the plea agreement, we will determine the appropriate remedy necessary to ensure the interests of justice are served—either withdrawal of the guilty plea or resentencing before another judge.

Id. (internal quotations omitted). The interests of justice here would be served by remanding this case for resentencing. Although there was some confusion about the nature of the plea during the plea hearing, the parties understood that the court was not bound by any sentencing recommendation. Resentencing will allow Robinson the opportunity for a sentencing hearing complying with the terms of the plea agreement that led to his guilty plea. I would remand the case for resentencing.